IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370
No. 73-559

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
v.
FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *Respondent.*

HECK'S INC., *Petitioner,*
v.
FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *Respondent.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MOZART G. RATNER
818 18th Street, N. W.
Washington, D. C. 20006

JOSEPH M. JACOBS
ALBERT GORE
JUDITH A. LONNQUIST
201 North Wells Street
Chicago, Illinois 60606

Counsel for Respondent

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BRIEF FOR RESPONDENT IN OPPOSITION [1]

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[1] Respondent herewith files a consolidated brief in opposition to the petitions filed by the National Labor Relations Board and Heck's, Inc., which petitions arise out of and pertain to the same case below.

OPINIONS BELOW

The opinion of the court of appeals (Bd. App. 1A-17A)[2] is reported at 476 F.2d 546.

The order of the court of appeals denying the Board's petition for rehearing appears at Bd. App. 25A. The supplemental decision and order of the Board (Bd. App. 26A-44A) is reported at 191 NLRB No. 146. The earlier decisions of the court of appeals and of the Board are reported at 433 F.2d 541 and 172 NLRB 2231, respectively. The Board's initial decision is reprinted in the Appendix to this Opposition, *infra*, pp. 1a-7a.

JURISDICTION

The jurisdictional requisites of the Board's petition are adequately set forth in its petition. Jurisdiction of Heck's petition is lacking because denial of Heck's inexcusably belated motion for intervention was well within the discretion of the court below. Accordingly, Heck's is not a "party" within 28 U.S.C. § 1254(1).[3]

QUESTIONS PRESENTED

In No. 73-370, the question is whether the court of appeals exceeded its authority in reversing as arbitrary, and therefore unwarranted in law, the Board's refusal to order certain remedies in this case.

In No. 73-559, the question is whether a victorious party before the Board who, without any asserted jus-

[2] "Bd. App." refers to the Appendices to the Board's petition.

[3] The question of jurisdiction is identical to the question whether Heck's had a right to intervene. See, *Auto Workers* v. *Scofield*, 382 U.S. 205, 209; cf. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 688; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142-143.

tification, deliberately refrains from moving to intervene as a party in a review proceeding which affects its interest, has an unconditional right to intervene after the court of appeals has rendered its decision.

STATUTE AND RULE INVOLVED

Section 10 of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. 160, provides in part:

> "(f) Any person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *."

Rule 15(d), Federal Rules of Appellate Procedure, effective July 1, 1968, provides:

> "(d) Intervention. Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene shall be filed within 30 days of the date on which the petition for review is filed."

STATEMENT

A. The Board's Initial Decision

In its first decision and order in this case, entered September 24, 1968, the Board found that, in 1967, Heck's, Inc., had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening to close its Clarksburg, West Virginia, retail store if its employees organized and by coercively interrogating and polling them about the Union (App. 2a).[4] The Board also found that Heck's refusal to bargain was in bad faith and therefore violated Section 8(a)(5).

The Board explained (App. 3a-5a):

> ". . . Respondent engaged in extensive violations of the Act which directly involved nearly every employee in the unit. We note further that the Board has recently found that this Respondent engaged in a pattern of similar unfair labor practices at its other stores in West Virginia and Kentucky, and that the Respondent has a labor policy in all its stores that is opposed to the policies of the Act. Earlier Board decisions involving the Respondent's operations show that President Haddad and Vice President Darnall, who together control the labor policy at all the Respondent's stores, have both actively participated at a number of stores in conduct found to be unlawful. Both have repeated their unlawful conduct in the present cases. Such flagrant repetition of conduct previously found unlawful shows a complete disregard by the Respondent of its obligations under the Act.
>
> * * *
>
> In the instant cases, the Respondent's refusal to grant recognition, followed by its extensive violations of the Act and its interference with the employees' free choice in the Board-conducted elec-

[4] "App." refers to the Appendices to this Opposition.

> tion, clearly evidence its unlawful motive and justify an interference [sic] of bad faith. Consequently, we find, contrary to the Trial Examiner, that the General Counsel has established that the Respondent's refusal to recognize the Union was not based on a good-faith doubt of the Union's majority status. We find further that its refusal was for the purpose of utilizing the preelection period to undermine the Union majority, and that the Respondent thereby made it impossible to hold a free and fair election. Accordingly, we find that the Respondent refused to bargain with the Union, in violation of Section 8(a)(5) and Section 8(a)(1) of the Act.
>
> In any event the Respondent's extensive Section 8(a)(1) violations, on which it embarked at about the time the Union attained its majority status and which made a free and fair election impossible, justify an order requiring the Respondent to bargain with the Union upon request as an appropriate remedy for the Respondent's 8(a)(1) violations."

The Board ordered remedies traditional in routine Section 8(a)(1) and (5) cases, but denied the Union's request for additional relief.

B. The Remand

On May 4, 1970, the court of appeals granted the Board's petition for enforcement of its order (433 F.2d 541), but, on the Union's petition for review (No. 22,318, in which Heck's did not intervene), remanded for further consideration of the adequacy of the remedies (433 F.2d at 543). The court explained (*ibid.*):

> "Since 1964 Heck's has been the object of nine other unfair labor practice proceedings which show, in the Board's words, 'a labor policy in all its stores that is opposed to the policies of the Act.'" [Footnote omitted.]

"The Board's findings of bad faith and flagrant misconduct lead us to remand this case to the Board for reconsideration, in the light of our recent decision in *Tiidee Products* [*International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *NLRB*, 426 F.2d 1243, cert. denied 400 U.S. 950], of the Union's request for further relief.[7]"

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[7] The Union requested a broad range of further relief: . . . [including] Union expenses expended to overcome the effects of the Company's unlawful refusal to bargain."

In its cited *Tiidee Products* case, the court of appeals, finding that the Company's "refusal to bargain was a clear and flagrant violation of the law" (426 F.2d at 1248), had held that in such cases "[e]ffective redress for statutory wrong should both compensate the party wronged and withhold from the wrongdoer the fruits of its violation." It had further held that the Board was empowered to "do something [more than it had traditionally done] to advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation." 426 F.2d at 1251. Among other things the court held the Board could do was assess against respondent the "costs of litigation." *Ibid.*, note 11. The court, therefore, remanded to the Board for reconsideration the various requests of the union for additional relief, *e.g.*, to compensate the employees for loss of collective-bargaining benefits during the period of the employer's bad faith refusal to bargain, and "such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these" (426 F.2d at 1253, n. 15).

C. The Board's Supplemental Decision

The Board accepted the remand in this case, and all parties, including Heck's, filed briefs with the Board. The Board issued its supplemental decision, 191 NLRB No. 146, on July 1, 1971, before handing down its decision on remand in *Tiidee.*

In preliminary discussion, the Board stated (Bd. App. 29A):

> "Viewed in isolation, the Respondent's conduct as found in this case, although serious, is not so aggravated or pervasive as to warrant additional special remedies. However, as we have had occasion to point out, in a somewhat different context with respect to this Respondent, it is by now clear that Respondent's conduct here is but part of a pattern of unlawful antiunion conduct engaged in by Respondent's top officials throughout Respondent's entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act. In such circumstances conduct at a single store such as this can no longer be viewed in isolation; Respondent's conduct must, rather, be viewed in its total context. As so viewed, Respondent's unfair labor practices are clearly aggravated and pervasive. It is, accordingly, against this background of companywide aggravated and pervasive unfair labor practices that we consider the Union's request for additional relief in this particular case." [Footnote omitted.]

The Board concluded that it was appropriate to grant certain additional non-monetary remedies, but refused to approve the Union's requests, *inter alia,* that employees be made whole for loss of collective-bargaining benefits and for a company-wide bargaining order without proof of majority in individual store units. The

Board also refused to order reimbursement of excess organizational costs and expenses of litigation engendered by Heck's flagrant illegal conduct.

As to the latter, the Board found that the Company's "aggravated and pervasive" unfair labor practices had imposed on the Union excess organizational expenses and costs of litigation.[5] But it refused to order reimbursement for specified reasons (Bd. App. 38A-39A):[6]

> "To determine the appropriateness of these reimbursement requests, we must, we believe, consider the role of a charging party under the statutory scheme in the light of the basic principles, that Board orders must be remedial not punitive,[16] and collateral losses are not considered in framing a reimbursement order.[17] As the Supreme Court has stated,[18] the statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and pro-

[16] *Republic Steel Corporation* v. *N.L.R.B.*, 311 U.S. 7, 11-12.

[17] *Gullett Gin Company, Inc.* v. *N.L.R.B.*, 340 U.S. 361, 364.

[18] *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283* v. *Scofield*, 382 U.S. 205, 217, *et seq.*

[5] "[W]e are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain." (Bd. App. 38A.)

[6] Only by ignoring the paragraph quoted above, p. 7, *supra*, can Board counsel argue (Pet. pp. 6-7, 12) that the Board denied the relief in issue here because it did not regard Heck's unfair labor practices as sufficiently "widespread, aggravated, and pervasive," rather than for the legal reasons quoted in the text—which are the ones the Board itself explicitly advanced.

tect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.[19]

[19] *Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714-717. Compare *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, where litigation expenses were awarded under a statute (42 U.S.C. 2000a *et seq.*) which places greater reliance on private action for the vindication of public rights."

On July 9, 1971, the Union again petitioned for review. On August 13, 1971, its counsel sent a copy of the petition to Heck's counsel. By accompanying letter, Heck's counsel was notified that this petition had been filed seeking to review the Board's order "insofar as it failed to provide the full relief requested by the Union," and Heck's counsel was specifically referred to the court of appeals' decision in *Tiidee* (App. 8a-9a). On August 20, 1971, the Board served on counsel for Heck's the certified list of the record and docket entries filed with the court on the Union's petition (App. 10a-12a). Heck's chose to ignore the review proceeding, and did not move to intervene in the court of appeals.

D. The Board's Supplemental Decision in Tiidee

On January 24, 1972, after the instant case had been fully briefed below, but before oral argument, the Board issued its supplemental decision and order in *Tiidee Products*, 194 NLRB 1234. While the Board con-

cluded that a make-whole order was not appropriate, it granted additional relief, both monetary and non-monetary, explaining:

> "... the Board believes that the alternative remedies provided hereinafter will undo some of the baneful effects pointed out by the court as having resulted from Respondent's 'clear and flagrant violation of the law.' They will, for one, aid the Union in rebuilding its strength so that it may bargain effectively with Respondent. Also, by requiring Respondent to pay some of the Board and union litigation costs occasioned by its misconduct, similar 'brazen' refusals to bargain will be discouraged." [Footnote omitted.] (At p. 1235.)

It characterized the proffered rationale for reimbursement of excessive organizing costs and litigation expenses as follows (at p. 1236):

> "The Union asserts that an award to it of organizational expenses, litigation costs and expenses, and lost initiation fees and dues would meet another of the court of appeals' objections to the Board's order; *viz.*, that our traditional remedy rewarded Respondent's delaying tactics and increased the likelihood that similar frivolous litigation would clog future Board and court calendars."

It denied reimbursement of organizing expenses because (*ibid*):

> "It is clear that the Union incurred no extraordinary organizational expenses because of Respondent's patently frivolous objection to the election and subsequent refusal to bargain. Despite certain already remedied preelection unlawful Respondent conduct, the Union was selected by the employees after a 2-month campaign at the first election held. *We find, therefore, no nexus* between Respondent's unlawful conduct here under exami-

nation and the Union's preelection organizational expenses and, *accordingly, we shall not award them to the Union.*" (Emphasis added.)

With respect to the Union's claim for litigation expenses, the Board stated (*ibid.*):

"We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board.[16]

We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases . . . . Accordingly, we shall order Respondent to pay to the Board and the Union the above-mentioned litigation costs and expenses.[17]

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[16] *Heck's, Inc., supra,* fn. 20.

[17] See also Rule 38, Federal Rules of Appellate Procedure. Cf. *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 166; *Schauffler* v. *United Association of Journeymen,* 246 F.2d 867 (C.A. 3, 1957)."

Thereupon, the Union moved to lodge the Board's *Tiidee* decision with the court below, arguing, in a supporting memorandum, that the rationale of that decision undermined and invalidated the Board's denial of litigation and organizing expenses in this case. The Board filed no response to that motion, and at no time prior to, or at, oral argument of this case did the Board request that this case be remanded for reconsideration in the light of its supplemental decision in *Tiidee*.

E. The Supplemental Decision of the Court of Appeals

The court below issued its supplemental decision herein on March 21, 1973. It agreed that in the supplemental decision in *Tiidee* "... the Board itself has subsequently departed from the rationale upon which its refusal of litigation expenses in this case is based" (Bd. App. 9A). It explained (Bd. App. 9A-10A):

> "We think the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative here. Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of 'clearly aggravated and pervasive' misconduct; and in its original opinion it questioned Heck's good faith because of its 'flagrant repetition of conduct previously found unlawful' at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief."

Similarly, as to organizational expenses, the court held (Bd. App. 11A):

> "As in the case of litigation expenses, the Board, upon remand in *Tiidee,* has shifted its ground with respect to organizational costs. In its Supplemental Decision in *Tiidee,* the Board did not allow the claim for excess organizational expenses, but it justified that action solely on the ground that '. . . the Union was selected by the employees after a 2-month campaign at the first election held;' and, because of this circumstance, the Board found '. . . no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses . . . .' Thus, in *Tiidee* the Board appears to have denied organizational costs because it believed that, on the facts of that case, no unusual organizational costs had been incurred.
>
> "This obviously is quite a different thing from saying that the policies of the Act forbid the allowance of such costs in cases like the one before us, where the Board has in terms indicated its awareness of 'the probability' that costs were experienced by reason of Heck's intransigence. Under these circumstances we find nothing in the Board's Supplemental Decision which constitutes an adequate justification for the denial of extraordinary organizational costs to which the Union was exposed by reason of Heck's policy of resisting organizational efforts and refusing to bargain; and we think that provision for such costs should have been included in the remedies fashioned by the Board on remand."

F. Subsequent Proceedings

On April 4, 1973, Heck's filed a two-page motion for leave to intervene "so as to be entitled to seek a rehearing *en banc* and, if thereafter necessary, review by the

United States Supreme Court." On April 17, Heck's tendered a petition for rehearing. The Union filed a brief in opposition to the motion to intervene, and, on May 18, 1973, the court (Chief Judge Bazelon dissenting) denied that motion.

The Board filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on substantially the same grounds it asserts in this Court. The petition was denied and no judge requested a vote on the suggestion for rehearing *en banc* (Bd. App. 24A, 25A).

ARGUMENT

1. As we demonstrate below, the only question actually presentable on the Board's petition is whether the court below correctly concluded that the Board's supplemental decision in *Tiidee* fatally undermined the Board's rationale for refusing reimbursement in this case, leaving that refusal arbitrary and therefore "unwarranted in law." *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 112-113. Inasmuch as that question is so plainly uncertworthy, petitioner does not even present it, electing instead to devise a question which carries the trappings of significance and novelty, namely, "the permissible scope of a court's authority to review an agency's remedial order which is attacked as inadequate to remedy the violation" (Bd. Pet. p. 9). But the premise on which that "presented" question rests —that the court below applied a different standard of review than is applicable where a remedy is alleged to be excessive—is entirely imaginary, and the reasons for review advanced at pp. 9-10 of the Board's petition are addressed to a straw-man.

Nothing in the opinion below even remotely suggests that the court applied or purported to apply a different

standard of appellate review to Board remedies claimed to be inadequate than to remedies attacked as excessive. To the contrary, in upholding the Board's denial of other additional remedies, the court made clear its awareness and application of the appropriate standard of review.[7] The most searching scrutiny of the court's opinion can unearth no shred of evidence that, in its treatment of litigation and organization expenses, the court applied a different or improper standard of review.[8]

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[7] The Board's refusal to grant the Union access to employees on company property was sustained as "an exercise of judgment which we are not disposed to overturn" (Bd. App. 6A). The Board's denial of the Union's request for a company-wide bargaining order was sustained as based on "considerations [which] seem to us rational in nature and well within the range of respect traditionally to be accorded by us to the Board's determinations [citing *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612, n. 32 (1969); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964); *International Union of Electrical Workers* v. *NLRB*, 426 F.2d 1243, 1250 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950]" (Bd. App. 7A-8A). (The first two of the cited cases involved claims by a respondent that the Board's remedy was too broad. In the third case (*Tiidee Products*), the Board accepted the remand. The joint citation of these three precedents is conclusive evidence that the Court of Appeals was not applying a double standard). In upholding the Board's determination that a make-whole remedy was not warranted, the court said: "[W]e are not inclined to say that the Board's treatment of this issue on remand is beyond the wide range of latitude traditionally accorded the Board in the matter of remedies" (Bd. App. 16A-17A).

[8] While petitioner asserts (and we agree) that the *same* standard is applicable whether the remedy is attacked as excessive or inadequate (Bd. Pet. pp. 9, 10, 11), that standard necessarily permits reversal wherever the grant or denial is "unwarranted in law or • • • without justification in fact." *American Power Co.* v. *S.E.C.*, *supra*. The quotations relied on by the Board requiring special deference to its expertise (Bd. Pet. p. 11) are particularly inapt in this case inasmuch as here the Board's denial of relief did not

The second question is based on the premise that the court below substituted its discretion for the Board's discretion in determining the appropriate remedy (Bd. Pet. p. 12). That premise is invalid because it is based on the false assumption that the Board refused to order reimbursement on the theory that "the violations in this case were not so aggravated and their effects not so broad as to require" it (p. 8, n. 6, *supra*), rather than for the legal reasons specified in the Board's own opinion (Bd. App. 38A-39A, quoted *supra,* pp. 8-9).[9]

2. Significantly, the Board does not argue that a question warranting certiorari would be presented if the court below was correct in holding that "the Board's decision in *Tiidee* undercut its rationale for denying reimbursement in this case." (Bd. Pet. p. 12.) It argues only that, as to this, the court below "was in error." But unless the authority of a court of appeals under Section 10(e) and (f) of the Act does not extend to examining the rationale of remedial orders for inconsistency and arbitrariness (which even the Board does not contend), the alleged incorrectness of the de-

rest "on a variety of factors peculiarly within the expert understanding of the [Board]," *Moog Industries* v. *FTC,* 355 U.S. 411, at 413, or "require the specialized experienced judgment of the [Board]," *FTC* v. *Universal-Rundle Company,* 387 U.S. 244, at 250, but rather was of "such a nature as to be peculiarly appropriate for independent judicial ascertainment as [a] 'question[ ] of law' ", *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508, inasmuch as the Board purported to follow the "general and well established [legal] principle" governing award of litigation expenses (p. 9, *supra*), a matter in which the courts, rather than the Board, have "expert understanding" and "specialized experience," pp. 17-18, *infra.*

[9] In any event, since the NLRB reports reveal no more than a handful of recidivists like Heck's, who deliberately flout their obligations under the Act at every opportunity, to excuse Heck's is to hold, in effect, that the relief in issue is *never* available where what the Board calls a "non-frivolous" defense is offered.

cision below does not warrant review. The decision is merely an application of the settled principle that ". . . the Board cannot act arbitrarily nor can it treat similar situations in dissimilar ways." *Burinskas* v. *NLRB,* 357 F.2d 822, 827 (D. C. Cir.); *Cooper Thermometer Company* v. *NLRB,* 376 F.2d 684, 691 (2 Cir.); *J. P. Stevens & Co.* v. *NLRB,* 406 F.2d 1017, 1024 (4 Cir.).

The Board does not deny that the court below was correct in holding that *Tiidee* undercut the Board's rationale for refusing reimbursement insofar as that rested on the assumed subordinate role of the charging party and the rule against punitive damages and reimbursement of collateral losses. (Bd. App. 8A-9A, 10A-11A). It insists, however (Bd. Pet. pp. 12-13), that the court below erred in rejecting the Board's attempt to confine its *Tiidee* rationale to employers who "follow a pattern of resisting union organization" (Bd. App. 10A), by litigating "frivolous defenses," excluding those, like Heck's, who do so by "clearly aggravated and pervasive misconduct," undertaken in "bad faith," through "flagrant repetition of conduct previously found unlawful." But its petition does not challenge the insight of the court below that both types of conduct "unduly burden the processes of the Board and the courts" (Bd. App. 10A), and that the Board's avowed objective of affording "speedy access to uncrowded Board and court dockets" (194 NLRB at 1236), rationally compels identical remedies.

Petitioner's argument, then, reduces to the claim (Bd. Pet. p. 13) that the Board was "not unreasonable" in adhering in this case to "the traditional American rule," under which, it says, in deference to "the right of a respondent to obtain an adjudication of the

issues he presents, * * * attorney's fees are not ordinarily recoverable * * *." But the "traditional * * * rule" does not distinguish between bad faith violations and bad faith defenses. It awards attorney's fees as well "where the behavior of a litigant has reflected a willful and persistent * * * defiance of the law" (*Brewer* v. *School Board of City of Norfolk, Virginia,* 456 F.2d 943, 949 (4 Cir.)), as where the proffered defenses are frivolous. *Vaughan* v. *Atkinson,* 369 U.S. 527, 530; *Siegel* v. *William E. Bookhultz & Sons, Inc.,* 419 F.2d 720, 723-724 (D. C. Cir.) ("where the *conduct* of his opponent has been oppressive"); *Local 149, UAW* v. *American Brake Shoe Co.,* 298 F.2d 212, 215 (10 Cir.) (where "the wrongdoer's *conduct* is unconscionable, fraudulent, willful, in bad faith, vexatious, or exceptional."). To the extent that the denial of reimbursement in this case is defended as "reasonable" by reliance on the "traditional American rule," it thus rests on an error of law which the court below was not merely empowered, but obliged, to correct.

3. The Board's claim that there is no inconsistency between *Tiidee* and this case in the Board's treatment of excess organization expenses depends on construing *Tiidee* to mean merely that the Board "found it unnecessary to consider the appropriateness of the remedy on the facts there * * *." (Bd. Pet. p. 14). But the court below was clearly correct in construing *Tiidee* to mean that if there had been a nexus between the employer's unfair practices and excess organizational expenses, reimbursement would have been ordered. For, as the court observed (Bd. App. 10A), the only reasons initially advanced by the Board for refusing reimbursement of excess organizational costs were the as-

serted "subordinate role of the charging party in the scheme of the Act," and the strictures against punitive orders and reimbursement of collateral losses. Having retreated from those excuses in *Tiidee,* nothing remained to justify continued refusal. Nexus having been found here, the principle of recoupment for such expenses having been adopted by the Board in *Tiidee,* and the standard having been set in this case of treating the award of organizational expenses and litigation expenses *in pari materia* (Bd. App. 38A-39A), the court was irresistibly driven to its conclusion that nothing in the Board's supplemental decision in this case "constitutes an adequate justification" for denial of the claim for extraordinary expenses.

The Board further contends (Bd. Pet. p. 14) that "if there were an inconsistency between the decisions, * * * the court below should not have resolved it without first obtaining the views of the Board." But the court was entirely justified in concluding that the Board's attempted differentiation of *Heck's* in *Tiidee,* p. 11, *supra,* was its final word on the subject. Particularly was this conclusion warranted since the Board filed no response to the Union's argument that the Board's supplemental decision in *Tiidee* required reversal here, p. 12, *supra,* and at no time until after the court issued its decision did the Board request a remand for reconsideration or amplification of its views. Contrary to petitioner's hypothesis that the court below might have "considered that the Board had not adequately explained its reasons for denying reimbursement in this case" (Bd. Pet. p. 14), the court made clear that it deemed the Board's explanation "adequate", but the result predicated thereon unlawful. Indeed, the court emphasized that this was its view by refusing to con-

sider alternative justifications invented by Board counsel:

> "Counsel for the Board in their brief in this court attempt to supply a number of reasons why excess organizational costs should not be taken into account, such as their assertedly speculative nature and their invitation of collateral litigation which burden the Board's administration of the Act. These are counsel's reasons, not the Board's; and, under familiar principles of judicial review of administrative agencies, we appraise the Board's actions only in terms of the latter." (Bd. App. 11A, note 8). Cf. Bd. Pet. p. 14, n. 9.

In sum, the court below justifiably concluded that it was time this case came to an end. Important considerations of judicial administration support that result. A second remand would entail further unconscionable delay, defeating "one of the objectives of the Labor Act—the prompt determination of labor disputes." *Auto Workers* v. *Scofield,* 382 U.S. 205, 213. Certainly, the Board cannot justifiably complain because the court of appeals in this case took it at its word. Like any other litigant, the Board is not entitled to a third bite at the cherry. If the Board desires in the future to predicate denial of reimbursement of organizational expenses on different grounds, the decision below will not constitute a bar. Surely the result of this particular case is not an issue of national importance warranting review by this Court, and no conflict of decisions is even claimed.

4. The Board's asserted fear that "the inevitable consequence of this decision will be a substantial number of cases in [the court below] challenging the Board's refusal to grant extraordinary relief" (Bd. Pet. p. 15)

is footless. As construed by the court of appeals, the Board's reimbursement rationale extends only to "employers who follow a pattern of resisting union organization" by flagrantly unlawful means (Bd. App. 10A), in "complete disregard" of their statutory obligations (App. 4a). The Board does not even claim that more than a handful of employers are in that category. Thus, even this conjured potential of the decision does not warrant the attention of this Court.

5. Heck's petition asks this Court to fashion broad principles of intervention in appellate proceedings, drawing analogies to the Federal Rules of Civil Procedure, the cases governing standing, and even the Freedom of Information Act (Heck's Pet. pp. 7-22). What the Company ignores is that this Court, with the approval of Congress, has already formulated a rule for appellate intervention which is completely dispositive of this case.

Rule 15, Federal Rules of Appellate Procedure, effective July 1, 1968, governs the procedure for review and enforcement of agency orders. Subsection (d) thereof, entitled "Intervention," provides, in pertinent part,

> "... a person who desires to intervene in a proceeding under this rule shall serve upon all parties ... a motion for leave to intervene .... A motion for leave to intervene ... shall be filed within 30 days of the date upon which the petition for review is filed."

Heck's, which clearly had a *right* to intervene under *Auto Workers* v. *Scofield*, 382 U.S. 205, also had a *duty* to move to intervene *timely* under Rule 15(d). Instead of so moving, however, the Company, being fully advised that the Union was asking the court below to take

action significantly affecting its interests, deliberately sat on the sidelines for almost two years, until the court handed down a decision adverse to it.[10]

Having failed to comply with Rule 15(d), the Company was properly ruled out of court. It is simply preposterous for Heck's to ask this Court to extricate it from the position it deliberately adopted by refusing to to move timely for intervention. It is particularly ironic that the very decision upon which Heck's relies for jurisdictional purposes, *Auto Workers* v. *Scofield*, *supra*, afforded intervention rights to successful charged parties, such as this Company, explicitly to avoid "unnecessary duplication of proceedings," to "centralize . . . the controversy and limit it to a single decision, accelerating final resolution," and to allow the would-be intervenor "to present [his] arguments to a reviewing court which has not crystallized its views" (382 U.S. at 212, 213). Heck's thirteenth

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[10] The record shows that the petition for review was filed by the Union on July 9, 1971. By inadvertent error, Heck's was not served with a copy of the petition at that time. However, counsel for the Union wrote to Heck's on August 13, 1971, enclosing a copy of the petition, notifying counsel that the petition had been filed to review the Board's order "in so far as it failed to provide the full relief requested by the Union," and specifically referring to the court's decision in *Tiidee* (p. 9, *supra*). Furthermore, on August 20, 1971, the Board served on counsel for Heck's the certified list of the record and docket entries (*ibid.*). The Company has never raised any question, and there can be none, about the adequacy of notice to it. Late service of the petition would, of course, have constituted justification for advancement of the 30-day period in which Heck's could file its motion for leave to intervene, had Heck's sought such advancement, but that period would have expired no later than September 15, 1971. Heck's never claimed lack of actual knowledge or timely notice of the petition as an excuse for its failure to move to intervene earlier.

hour attempt to intervene below is completely at cross-purposes with the policy enunciated by this Court for permitting intervention in the first place.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

MOZART G. RATNER
818 18th Street, N. W.
Washington, D. C. 20006

JOSEPH M. JACOBS
ALBERT GORE
JUDITH A. LONNQUIST
201 North Wells Street
Chicago, Illinois 60606

Counsel for Respondent

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